In The

Supreme Court of the United States

October Term [illegible]

No. [illegible]

Commonwealth of [illegible],
Petitioner,

v.

[illegible], et al.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF RAYMOND E. COOPER ET UX., ET AL. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INDEX

CITATIONS

CASES:

TREASURY RULINGS:

IN THE

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OCTOBER TERM 1964

No. 237

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ROBERT LEE MERRITT, ET UX., ET AL.

On Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RAYMOND E. COOPER ET UX., ET AL. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Raymond E. Cooper, et al, with written consent of all parties to the case, which consents are on file with the Clerk, respectfully presents this brief on the merits in support of respondents.

INTEREST OF *AMICUS CURIAE*

The position of *amicus curiae, Raymond E. Cooper, et al*,[1] is similar to that of respondents (No. 237). This

[1] References are to the appellants in *Commissioner* v. *Raymond E. Cooper, et al*, 330 F.(2d) 163 (4 Cir. 1964), in which the Com-

position is challenged by Jewell Ridge Coal Corporation as *amicus curiae*, not only in a brief filed on the merits in No. 134, but also in a reply brief filed in No. 134 which is in substance a reply to the brief for respondents in No. 237. This brief will be limited to a discussion of the "reply brief" filed by *Jewell Ridge* as *amicus curiae* in No. 134.

ANALYSIS OF REPLY BRIEF AS *AMICUS CURIAE* OF JEWELL RIDGE COAL CORPORATION

Jewell Ridge maintains (Reply Brief, pp. 2, 3) respondents in Number 237 have failed to support by adequate citations to the record that Paragon had the duty and obligation to accept and pay for all marketable coal produced and mined by the operators. At page 5 of respondents' brief in the Statement of Facts referring to Paragon's obligation to so accept all coal, the following pertinent references were noted:

R. 54, 64, 114, 136, 147, 180, and 186.

In addition thereto the record contains evidence of this obligation of Paragon's at the following references:

R. 50, 94, 105, 113, 131 and 142

Accordingly, Paragon's obligation is clearly established by the record, contrary to Jewell Ridge's contention.

Next, Jewell Ridge misquotes respondents by stating that the operators could not produce and sell coal without Paragon. (Reply Br. p. 3). The statement made by respondents was that under the agreements "neither [Paragon or the operators] could recover, process and sell the mineral without the other." (Rep. Br. p. 18)

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missioner's petition for writ of certiorari (No. 262) was not granted pending a decision in the present case.

Jewell Ridge contends that other coal companies in the area would not buy "bootleg" coal, if the operators attempted to sell their coal to processors other than Paragon. (Reply Br. p. 3, Footnote 2) The Commissioner employed speculative reasoning in his brief by advancing as his main contention that Paragon could set the price paid the operators at any level it chose and if they failed to produce coal replace them with other operators. Respondents countered by showing that if Paragon committed such a breach of its agreements, they would be legally free to sell the coal elsewhere and remit to Paragon its share of the selling price. Now Jewell Ridge, which is but one of a number of coal processors in the area, asserts that it would not buy such coal. It must be clear however, that the coal would not be "bootleg" coal since the operators would be exercising their right and duty to mitigate damages in view of a breach of contract by Paragon. Moreover, neither Paragon nor the operators is unionized, so there is no problem of liability to the United Mine Workers Welfare Fund on such coal.

The reference to the fact that Paragon on occasion shut down its tipple for repairs, shortage of railroad cars and other business reasons (Reply Br. p. 4) and the operators would also suspend operations underscores the mutuality of the agreements and the fact that they were both interested in the successful and profitable selling of the coal produced. The suspensions were always of a short duration, for good reasons and the operators always had repairs, water drainage, roof support, rock removal and maintenance work which they could do while they were waiting on Paragon.

G.C.M. 26290 1950-1 C.B. 42 was the position of the Commissioner at the time the agreements between Paragon and the operators were made. This ruling of the Treasury Department still represents the announced position of the Government on strip mining and it has been

cited with approval by the courts, *Parsons* v. *Smith*, 255 F. (2d) 595, 598 (3 Cir. 1958), aff'd. 359 U.S. 215 and *Usibelli* v. *Commissioner*, 229 F.(2d) 539, 543 (9 Cir. 1959). In G.C.M. 26290, supra, the Treasury Department adopted the following position:

> "In the opinion of this office, a contract which is terminable by the coal company at will, and which thus fails to vest in the contractor the requisite capital interest in the mineral in place, is one in which the coal company has an absolute right to cancel at any time without cause or condition.
>
> * * * *
>
> "One of the contracts examined shows that the coal company reserves the right, without payment of damages, to 'suspend' work indefinitely at any time or from time to time; under another contract, the coal company is given the right, upon 5 days' notice to the contractor and without payment of damages, to 'suspend' work for an indefinite period; and under a third contract the coal company may 'suspend' operations during such time or times as the company operates at a loss because of the minimum payable to the contractor. Since contracts of this character, despite the power of indefinite suspension provided for therein, do not, except under specific conditions, appear to permit the coal company to dismiss contractors absolutely and substitute others to extract the mineral, it is the opinion of this office that such contracts should not be classified as contracts which may be cancelled 'at will'."

The attempt of Jewell Ridge to minimize the correlation between the amounts paid the operators (R. 230, Ex. 74) and the Bituminous Coal Index (R. 247-251, Ex. 98) is not well founded. (Reply Br. pp. 4 to 10). It insists (p. 9) that in August 1955 when the Bituminous Coal Index hovered at 99.7, Paragon increased the operators rate to $4.25. Not so, Paragon did not increase the operators' rate to $4.25 until September 1, 1955 (R. 230) when the index went up to 106.3 (R. 249). Other state-

ments of Jewell Ridge in this regard are equally inaccurate.

The graph (Respondents' Brief p. 49) shows the general relationship of the bituminous coal market to the price the operators received and it is apparent that the correlative factor is extremely high. The relationship of the operators' price to the price Paragon received for processed coal, or the price it paid for off lease coal would be more meaningful. But Paragon did not introduce its price data into evidence, even though its burden of proof was equal to that of respondents and even after respondents had introduced the Bituminus Coal Price Index. The rule governing such situations is well stated by the Tax Court in *Wichita Terminal Elevator Co.*, 6 T.C. 1158, 1165, aff'd 162 F.(2d) 513 (10 Cir. 1947):

> "The rule is well established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable. . . . This is especially true where, as here, the party failing to produce the evidence has the burden of proof or the other party to the proceeding has established a prima facie case."

Jewell Ridge insists that the amounts due the operators were payable by Paragon whether it gained or lost on sale of the coal and such amounts were payable from Paragon's borrowed or equity capital. (Reply Br. p. 10, Footnote 3) Such a view ignores both the legal and economic realities of the agreements here involved. The operation was a continuing venture and not a series of unrelated sales by the parties. When the coal market declined significantly Paragon had the protection of a corresponding decrease in the price paid to the operators. The operators were not so fortunate . . . they either could not or did not decrease the wages of their employees. (R. 120) Moreover, Paragon's borrowed and equity capi-

tal did not suffer. Paragon's last taxable year before the Court is the year ended September 30, 1957. Its tax return for that year (Exhibit 62-BK, Schedule L) shows that after five years of operations it had earned surplus and undivided profits (after payment of dividends) of $1,207,140.05, cash in the amount of $534,369.35 and notes receivable of $428,972.59.

Again, Jewell Ridge seeks to influence the deliberations of this Court by making statements of alleged facts from the record of *Commissioner* v. *Raymond E. Cooper, et al*, No. 262 this Term. (Reply Br. pp. 11, 12) The propriety of such tactics is open to question, but as long as Jewell Ridge pursues such a course, it should be accurate in its statements. The testimony cited by Jewell Ridge from another case merely emphasizes the fact that in Buchanan County, Virginia processing coal companies are not able to run continuously due to breakdowns, lack of railroad cars or a temporary lack of coal orders. When this occurs, the coal mine operators cooperate and also suspend their production. (See G.C.M. 26290 and discussion at pages 3 to 4, supra) On the question of the alleged control of Jewell Ridge over the production of its operators, other testimony of its Secretary and Treasurer Bunton is more in point. When asked about an attempt on the part of Jewell Ridge to terminate the operations of some of its operators Bunton testified as follows: (Transcript of Testimony Cooper Case p. 244)

> "Q When the miners refused to—these six refused to be terminated, you continued to accept their coal, did you not?
>
> A Yes, sir."

CONCLUSION

For the reasons stated herein and more fully developed in the Brief for Respondents filed herein, the judgment of the Court of Appeals permitting depletion deductions to coal mine operators should be affirmed.

Respectfully submitted,

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MARCH, 1965